Supreme Court, U.S.
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No. 94-251

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN PAUL ROBERTSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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Respondent does not attempt to defend on its own terms the Ninth Circuit's conclusion that the movement of people and goods to Alaska from the lower 48 States in connection with the activities of a business "enterprise" cannot establish that the activities of that enterprise "affect[ ] interstate * * * commerce" within the meaning of RICO. As we have demonstrated (Pet. 13-15), that conclusion seriously disserves the goals that Congress intended to achieve in enacting RICO, will cause confusion among jurors who must be instructed on the interstate element of RICO, and will raise doubts about the applicability of scores of federal statutes in Alaska and other isolated areas of the country. This Court should correct the Ninth Circuit's error and resolve the conflict it created with the decisions of seven other circuits.

1. Respondent's principal contention (Br. in Opp. 1-2) is that the Ninth Circuit's decision does not conflict with the decisions of other circuits, because he was convicted under 18 U.S.C. 1962(a), and every court of appeals that has taken a different view of the interstate commerce requirement has done so in cases brought under 18 U.S.C. 1962(c). Each subsection of RICO, however, uses identical language to require proof of an enterprise "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a), (b) and (c). Because it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning," *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992); see also *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1169 (1993), there is no basis for respondent's contention that the same interstate nexus requirement should be interpreted differently depending on the subsection of RICO in which it appears.[1]

Moreover, respondent's contention is flawed on its own terms, because the Ninth Circuit did not purport to fashion a separate test for the interstate commerce element of Section 1962(a). To the contrary, each of the cases the Ninth Circuit cited in support of its conclusion was brought under Section 1962(c). See Pet. App. 8a-9a; *Musick* v. *Burke*, 913 F.2d 1390, 1398 (9th Cir. 1990); *United States* v. *Bagnariol*, 665 F.2d 877, 892 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); *United States* v. *Rone*, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980). There is therefore no basis for believing

[1] Respondent might just as plausibly suggest that the "pattern" requirement of RICO, which also is shared by all RICO offenses, should be interpreted differently depending on the subsection of RICO at issue. This Court, however, adopted a single approach to that issue in a case that raised claims under each subsection of RICO. See *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 233-234 (1989).

that the Ninth Circuit's ruling in this case can or will be limited to cases brought under Section 1962(a). Indeed, the precedent that the court found dispositive of the interstate nexus issue (Pet. App. 9a-10a) held that the jurisdictional reach of RICO "extends to the constitutional limits of Congress' power to regulate interstate commerce." *Musick* v. *Burke*, 913 F.2d at 1398. The Ninth Circuit therefore necessarily held that the activities proved by the government in this case cannot be reached by *any* statute that Congress might enact. That result is contrary to this Court's cases construing the reach of Congress's power under the Commerce Clause (see Pet. 8-13) and is sufficiently important to warrant this Court's attention.

2. Respondent also suggests (Br. in Opp. 2) that his shipment of materials and supplies to Alaska should be excluded from the determination whether the activities of the enterprise affected interstate commerce, because those shipments did not "involve the operation of the enterprise but rather the establishment of the enterprise." Respondent, however, points to nothing in RICO to support the legal significance of that distinction, or to demonstrate that Congress intended to require proof that the enterprise engaged in interstate commerce after the defendant captured it. See Br. in Opp. 2-3. As we have demonstrated (Pet. 8-9), Congress's use of the phrase "affect commerce" establishes that no such requirements were intended. See *Scarborough* v. *United States*, 431 U.S. 563, 564 n.1, 575 (1977) (in crime of "possess[ing] * * * affecting commerce * * * any firearm," jurisdictional element is satisfied by proof that the firearm was shipped in commerce at any point in time, even if that occurred before the defendant acquired the firearm).

Moreover, because respondent "establish[ed]" the enterprise for the purpose of engaging in the gold mining business, it is difficult to see in this case how the interstate

shipment of equipment and materials necessary to conduct that business, which were then used in the day-to-day activities of the gold mine, can possibly be disassociated from "the operation of the enterprise." Br. in Opp. 2.[2] In any event, respondent does not dispute (1) that he and his employees traveled between Alaska and the lower 48 States throughout the period of ownership, (2) that the mine sold a significant amount of gold in Alaska, or (3) that he mortgaged his Phoenix, Arizona, home to finance the operation of the gold mine. As we have demonstrated, those activities were sufficient by themselves to prove that the enterprise's activities affected interstate commerce under the correct legal standard. See Pet. 10-13.

* * * * *

[2] Citing *United States* v. *Rone, supra,* and *United States* v. *Nerone,* 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978), respondent also suggests in passing (Br. in Opp. 2) that the interstate character of predicate acts of racketeering may not be considered in determining whether the activities of the enterprise affected interstate commerce. Respondent is mistaken. The principle to which he adverts merely holds that when the government proves that the activities of the enterprise affect commerce, it need not *also* prove that the racketeering acts or the activities of each defendant independently affected commerce. See, *e.g., United States* v. *Bagnariol,* 665 F.2d 877, 892-893 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); *United States* v. *Murphy,* 768 F.2d 1518, 1531 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986). That principle does not preclude consideration of the racketeering conduct or the acts of the particular defendant to the extent those matters are logically relevant to whether the activities of the enterprise affected interstate commerce. See *United States* v. *Bagnariol,* 665 F.2d at 893 (rejecting similar claim based on *Rone* and *Nerone*; predicate acts not considered if they are "unrelated to the activities of the enterprise," but case law "demonstrate[s] that the same acts that satisfy the interstate commerce nexus to the enterprise also may be alleged as predicate acts").

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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